



United States Department of the Interior

FISH AND WILDLIFE SERVICE
New England Field Office
70 Commercial Street, Suite 300
Concord, New Hampshire 03301-5087



December 24, 2002

Mr. Wayne Ives
Watershed Management Bureau
NH Dept. of Environmental Services
P.O. Box 95, Hazen Drive
Concord, NH 03302-0095

1

PARTIAL
MENTAL
PAXE

Dear Mr. Ives

This is in response to your November 18, 2002 notice and request for comments on the initial proposal for rules for the protection of instream flow on designated rivers.

As you know, the last time we provided detailed comments on the instream flow rules was on the June 1, 2001 version. Significant changes have occurred in the enabling legislation since the 2001 version was published which have collapsed the geographic scope of the rules from a fairly comprehensive coverage of eight rivers to a comparatively small pilot program on the Lamprey and Souhegan Rivers. The revisions reflected in the recent proposal incorporate the changes in the enabling legislation but do little to address the concerns we expressed in our July 3, 2001 comment letter to make the rule more functional and environmentally protective.

According to Section 1906.01 of the proposed rules, a "water management plan" is to be developed for the Lamprey and Souhegan Rivers. The purpose of the water management plan is to set forth how the protected instream flow established in Section 1905 shall be maintained. Section 1906.07(b) specifies that the commissioner shall adopt the water management plan if implementation of its subparts (conservation plan, water use plan and dam management plan) will result in "maintenance" of the protected instream flow. Section 1906 does not, however, describe what will happen when stream flows fall below the protected instream flow. The provisions of the enabling statute at 483:9-C.IV require that the protected instream flow be maintained "except when inflow is less than the protected instream flow due to natural causes and certain emergency situations". This statutory language should be included in the rules to make it clear that the state intends to set the protected instream flow at a level sufficient to protect all enumerated functions and uses even if it becomes necessary to curtail certain water uses as streamflow falls below the protected flow threshold. By constructing the rule as proposed, we are concerned that the Department will either be forced to adopt a very low protected instream flow and/or a flow that has to be "maintained" by flow augmentation.

Under 1906.07(b)(4) of the proposed rule, agriculture and public water supply are considered "outstanding characteristics" but not the other uses enumerated in RSA 483:1 and 2 such as wildlife or fisheries. Subsection 1906.07(b)(4) should either be revised to include all of the other specifically enumerated uses or the subsection should be deleted from the rule. As currently drafted, the rule is heavily tilted in favor of agricultural and public water supply uses over recreational, fisheries, wildlife, environmental, cultural, historical, archaeological, scientific, ecological, aesthetic, and community characteristics.

In previous versions of the instream flow rules dating back over the past decade, the rules required hydroelectric facilities on designated rivers to establish the U. S. Fish and Wildlife Service's Interim Regional Policy Aquatic Base Flow as the minimum release. The present version of the rules contains no such provision. We are concerned about the potential implications of the rule change because in all likelihood, it would result in hydropower licensees being confronted with two sets of minimum flow requirements (state and federal), a situation that serves neither the regulated public nor New Hampshire natural resources well.

Until this version of the rules was circulated for review we remained hopeful that the Department would address the concerns expressed in our previous correspondence and develop a final rule that would truly protect New Hampshire's aquatic resources. We are no longer hopeful that will happen, at least not in the foreseeable future. In view of the above, we recommend that they not be adopted.

Questions may be directed to me or Vernon Lang at 603-223-2541 or email vernon_lang@fws.gov.

Sincerely yours,



Michael J. Bartlett
Supervisor
New England Field Office